Supreme Court, U.S.
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No. 94-

In The

Supreme Court of the United States

OCTOBER TERM, 1994

LANSING DAIRY, INC., *et al.*,

Petitioners,

v.

DAN GLICKMAN,
SECRETARY OF AGRICULTURE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 21, 1995

QUESTIONS PRESENTED

1. Whether *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires judicial deference to an agency's reversal of its longstanding interpretation of a statute that it administers, where the agency has neither acknowledged that it changed its interpretation nor provided a reasoned explanation of the change.

2. Whether a court, in applying *Chevron*, is required to draw reasonable inferences from the statutory text to determine the intent of Congress.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The petitioners in this case are Lansing Dairy, Inc., Liberty Dairy Company, and Frigo Cheese Corporation. Petitioners were plaintiffs in the district court and appellants/cross-appellees in the court of appeals.

Farmers Union Milk Marketing Cooperative, Gerald Piche, Peter J. Kleiman, Edward O. Kleiman, Art J. Corey, Jr., Raymond J. Marsicek, Ralph Brock, Ed E. Hanchek, Robert S. Hanchek, Raymond S. Huber, Benjamin C. Huber, and George A. Huber were plaintiffs in the district court and appellants/cross-appellees in the court of appeals. The Manitowac Milk Producers Association intervened as a plaintiff in the district court and an appellant/cross-appellee in the court of appeals.

Mike Espy, Secretary of Agriculture (as successor to Edward R. Madigan), was a defendant in the district court and an appellee/cross-appellant in the court of appeals. Pursuant to Rule 35.3 of the Rules of this Court, Secretary of Agriculture Dan Glickman is automatically substituted as a respondent in this Court. The Producers Equalization Committee intervened as a defendant in the district court and an appellee/cross-appellant in the court of appeals.

Lansing Dairy, Inc., is a wholly-owned subsidiary of Melody Farms, Inc., which in turn is a wholly-owned subsidiary of Melody Foods, Inc. Effective April 1, 1995, the assets of Lansing Dairy have been transferred to Melody

Farms, Inc. Liberty Dairy is a wholly-owned subsidiary of Dean Foods Company. Frigo Cheese Corporation has been merged into Stella Foods, Inc., a wholly-owned subsidiary of Specialty Foods Corporation.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	8
CONCLUSION	19
APPENDIX A	1a
APPENDIX B	41a
APPENDIX C	61a
APPENDIX D	208a
APPENDIX E	266a
APPENDIX F	268a

TABLE OF AUTHORITIES

Cases

Page

AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988) 5

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, No. 94-859 (argued April 17, 1995) 18

Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 9

Brannan v. Stark, 342 U.S. 451 (1952) 10, 17

Brown v. Gardner, 115 S. Ct. 553 (1994) . 15, 16, 18, 19

Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984) . . . . . *passim*

City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994) 16

De Osorio v. INS, 10 F.3d 1034 (4th Cir. 1993) 11

Exxon Corp. v. Lujan, 970 F.2d 757 (10th Cir. 1992) 11

Farmers Union Milk Marketing Coop. v. Yeutter, 930 F.2d 466 (6th Cir. 1991) 4

Flagstaff Medical Ctr., Inc. v. Sullivan, 962 F.2d 879 (9th Cir. 1992) 11

Good Samaritan Hospital v. Shalala, 113 S. Ct. 2151 (1993) 12, 15

Greater Boston Television v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) 11, 12

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 12

Lehigh Valley Coop. Farmers, Inc. v. United States, 370 U.S. 76 (1962) 2, 9, 17

MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223 (1994) 16

Mazza v. Secretary of Department of Health & Human Services, 903 F.2d 953 (3d Cir. 1990) . . . 11

Mobil Oil Corp. v. EPA, 871 F.2d 149 (D.C. Cir. 1989) 10, 14

Morton v. Ruiz, 415 U.S. 199 (1974) 12

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) 12

NLRB v. United Food & Commercial Control Workers Union, Local 23, 484 U.S. 112 (1987) . . . 7

Pauly v. Bethenergy Mines, Inc., 501 U.S. 680 (1991) 13

Russello v. United States, 464 U.S. 16 (1983) 16

Rust v. Sullivan, 500 U.S. 173 (1991) 12

SEC v. Chenery Corp., 318 U.S. 80 (1943) 14

Sacred Heart Medical Center v. Sullivan, 958 F.2d 537 (3d Cir. 1992) 11

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 17

Schepps Dairy, Inc. v. Bergland, 628 F.2d 11 (D.C. Cir. 1979) 4

Seldovia Native Ass'n Inc., v. Lujan, 904 F.2d 1335 (9th Cir. 1990) 11

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 12

Stark v. Wickard, 321 U.S. 288 (1944) 10

Sweet Home Chapter v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994) 18

United States v. Rock Royal Coop., Inc., 307 U.S. 533 (1939) 10

Wagner Seed Co. v. Bush, 946 F.2d 918 (D.C. Cir. 1991) 13

Watt v. Alaska, 451 U.S. 259 (1981) 12

Zuber v. Allen, 396 U.S. 168 (1969) 6, 9, 17

Zuber v. Allen, 402 F.2d 660 (D.C. Cir. 1968) 6, 8

Statutes and Rules

5 U.S.C. §§ 556 and 557 5

7 U.S.C. § 602 . . . . . 7, 16, 17

7 U.S.C. § 608c(5) . . . . . *passim*

7 U.S.C. § 608c(5)(A) 3, 16

7 U.S.C. § 608c(5)(B) 3

7 U.S.C. § 608c(5)(B)(ii) 6

7 U.S.C. § 608c(5)(B)(ii)(c) 16

7 U.S.C. § 608c(18) . . . . . *passim*

16 U.S.C. § 1538(a)(1) 18

28 U.S.C. § 1254(1) 2

38 U.S.C. § 1151 15

42 U.S.C. § 300a-6 12

42 U.S.C. § 6924(h)(4) 10

Agricultural Adjustment Act,
48 Stat 31 17

7 C.F.R. § 1040.2 (1994) 2

7 C.F.R. § 1040.61 3

54 Fed. Reg. 26,768 5

54 Fed. Reg. 29,327 5

59 Fed. Reg. 42,422 14

59 Fed. Reg. 61,070 14

Miscellaneous

1 Kenneth Culp Davis & Richard J. Pierce, Jr.,
Administrative Law Treatise (3d ed. 1994) 11, 13

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United States Department of Agriculture,
Agricultural Marketing Service,
Dairy Division, *Federal Milk Order Market Statistics, 1993 Annual Summary* 9

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LANSING DAIRY, INC., ET AL.,

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DAN GLICKMAN,
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Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 39 F.3d 1339. The opinion of the district court

(App., *infra*, 41a-60a) is unreported. The decision and order of the Judicial Officer (App., *infra*, 61a-207a) are reported at 50 Agric. Dec. 1453. The initial decision and order of the Administrative Law Judge (App., *infra*, 208a-265a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1994. A petition for rehearing was denied on January 23, 1995. App., *infra*, 266a-267a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 608c(5) and 608c(18) of Title 7, United States Code, and 7 C.F.R. Part 1040 are reproduced, in relevant part, at App., *infra*, 268a-278a.

STATEMENT

1. The Secretary of Agriculture regulates the price of raw milk under authority delegated to him by the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. §§ 601-626 (1988 & Supp. V 1993). See *Lehigh Valley Coop. Farmers, Inc.* v. *United States*, 370 U.S. 76, 78-81 (1962). Pursuant to the AMAA, the Secretary has issued a series of Milk Marketing Orders regulating milk prices in specified geographic areas. Federal Order 40, the order at issue in this case, applies to southern Michigan. See 7 C.F.R. § 1040.2 (1994).

The Secretary's Milk Marketing Orders establish minimum prices that regulated dairy processors (known as "handlers") must pay dairy farmers (known as "producers")

for raw milk.[1] Congress has provided that Milk Marketing Orders may contain certain specified terms and "no others." 7 U.S.C. § 608c(5). A Milk Marketing Order may include terms:

> [c]lassifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay . . .. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

7 U.S.C. § 608c(5)(A). This case involves location adjustments, the third type of adjustment to handler and producer milk prices permitted by § 608c(5).[2] Location adjustments are intended to take account of the cost of

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[1] Handlers pasteurize, process, and package fluid milk and milk products.

[2] Section 608c(5)(B) contains producer milk price provisions that complement the handler provisions of § 608c(5)(A) by requiring "payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject . . . only to adjustments for . . . (c) the location at which delivery of such milk is made." The final farm price of raw milk depends upon the aggregate of all producer and handler price adjustments. See 7 C.F.R. § 1040.61.

transporting milk from rural areas where large amounts of milk are produced to handlers located in or near urban areas where locally-produced milk is in short supply. See *Schepps Dairy, Inc.* v. *Bergland*, 628 F.2d 11, 15-16 (D.C. Cir. 1979).

In addition to specifying the terms that the Secretary may include in a Milk Marketing Order, Congress has specified certain economic factors that the Secretary must consider "prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term." 7 U.S.C. § 608c(18). In particular, Congress has directed the Secretary to consider "economic conditions which affect market supply and demand for milk and its products in the marketing area," with the ultimate objective of "assur[ing] a level of farm income" that is sufficient to attract an adequate supply of milk. 7 U.S.C. § 608c(18). The underlying statutory question in this case is whether the Secretary is required to consider these economic factors prior to approving or amending price adjustments authorized by § 608c(5).

2. a. In 1988, the Producers Equalization Committee ("PEC") proposed to amend Order 40 by reducing location adjustments for milk delivered within Michigan's Southern Peninsula and increasing location adjustments elsewhere. PEC's proposal "had the general effect of increasing the amount which producers received for producing milk throughout the Southern Michigan milk marketing area" (where most of PEC's members are located), while lowering milk prices received by producers located outside southern Michigan. App., *infra*, 9a. See *Farmers Union Milk Marketing Coop* v. *Yeutter*, 930 F.2d 466, 470 (6th Cir. 1991).

The Secretary conducted a formal rulemaking proceeding pursuant to 5 U.S.C. §§ 556 and 557, and issued a final decision adopting PEC's proposed amendments to Order 40. See 54 Fed. Reg. 26,768 (1989) (proposed rule); 54 Fed. Reg. 29,327 (1989) (final rule).[3] The Secretary relied on 7 U.S.C. § 608c(5) as the statutory basis for the amendments, and declined to consider the economic factors set out in § 608c(18). See 54 Fed. Reg. at 26,774-75; Pet. App 99a-100a. Indeed, the Secretary expressly found that the supply of milk was adequate to meet demand prior to the amendments. 54 Fed. Reg. at 26,778; Pet. App. 114a. The Secretary's decision did not acknowledge that it was departing from prior agency practice, under which milk price adjustments for location consistently were evaluated with reference to the supply and demand standards of § 608c(18).

b. Petitioners sought administrative review of the milk price amendments. The Administrative Law Judge ("ALJ") issued a decision holding that the Secretary's action was not in accordance with law. App., *infra*, 208a-265a. The ALJ concluded that the Secretary had departed from his prior policy of applying the economic factors of Section 608c(18) to proposed location adjustments. The ALJ noted that "[t]his change of policy was not explained, thereby snubbing [the] principle" that "to the extent that it is 'changing course, [it] must supply a reasoned analysis indicating that prior policies are being deliberately changed, not casually ignored.'" App., *infra*, 252a (quoting *AT&T* v. *FCC*, 836 F.2d 1386, 1392-93 (D.C. Cir. 1988)). The ALJ further concluded that the

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[3] The Secretary's rulemaking decision is reprinted in full in the Judicial Officer's opinion. See App., *infra*, 70a-126a.

amendments could not be justified under the § 608c(18) standards. App., *infra*, 252a-254a.[4]

c. The Judicial Officer reversed the ALJ's decision. App., *infra*, 61a-207a. The Judicial Officer, like the ALJ, recognized that policy reversals must be acknowledged and explained by the agency. App., *infra* 200a. But the Judicial Officer asserted that the Secretary had consistently adhered to the position that he need not consider the § 608c(18) factors prior to adopting or modifying location adjustments. App., *infra*, 185a-186a.[5]

3. The district court (W.D. Michigan, Gibson, J.) entered summary judgment for petitioners. App., *infra*, 41a-60a. Applying the two-step analysis of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court concluded that Congress unambiguously required the Secretary to consider the economic factors set out in § 608c(18) prior to adopting location adjustments. The court stated that, in determining whether the statute is ambiguous, it would "apply the traditional tools of statutory construction to determine the

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[4] The ALJ also held that the amendments were invalid because the revised location adjustments were not supported by reference to any "economic service of benefit" to the milk handlers whose prices were increased. App., *infra*, 257a-260a; see *Zuber* v. *Allen*, 396 U.S. 168, 184 (1969). In addition, the ALJ held that the amendments were based on impermissible "consideration of the use to which the milk of a particular producer or class of producers is put," contrary to 7 U.S.C. § 608c(5)(B)(ii). App., *infra*, 263a (quoting *Zuber* v. *Allen*, 402 F.2d 660, 683 (D.C. Cir. 1968), *aff'd*, 396 U.S. 168 (1969)).

[5] The Judicial Officer also rejected the ALJ's other grounds for invalidating the amendments. The Judicial Officer concluded that "location adjustments can be adopted for any of the broad objectives of the Act," and are not limited to compensating producers for providing an "economic service of benefit" to handlers. App., *infra*, 191a.

intent of Congress." App., *infra*, 49a (citing *NLRB* v. *United Food & Commercial Control Workers Union, Local 23*, 484 U.S. 112 (1987)). Invoking the maxim that "[a] statute should be viewed as a whole," App., *infra*, 53a (citing 2A Norman J. Singer, *Sutherland on Statutory Construction* § 46.05 (5th ed. 1992)), the court looked to the language of 7 U.S.C. §§ 602 and 608c(5)(A) to conclude that the term "minimum prices" in § 608c(18) "encompasses both the original uniform price and the adjusted price." App., *infra*, 54a. In addition, the court applied the maxim that a court should be guided by "the purpose of the statutory scheme" in interpreting statutory language. Pet App. 57a. The court concluded that the purpose of the Act is to "guide the Secretary in setting prices in order to avoid disorderly market conditions," and that it would be "illogical for Congress to carefully articulate all factors the Secretary must take into account when fixing class prices yet allow location adjustments, which ultimately affect the actual cost of milk, to be adjusted without any guidance whatsoever." App., *infra*, 57a-58a. The court observed that the Secretary's interpretation would permit him "to circumvent the specific Congressional delegation by conducting all market regulation through price adjustments." App., *infra*, 58a.

4. The court of appeals (Celebrezze, Martin, and Batchelder, JJ.) reversed. App., *infra*, 1a-40a. In applying the *Chevron* analysis, the court concluded that "[b]ecause we cannot find the plain language of the statute to be unambiguous, we must defer to the Secretary's interpretation, unless we find that this interpretation frustrates the policy that Congress sought to implement." App., *infra*, 23a (internal quotation omitted). The court found portions of the legislative history "troubling," but ultimately concluded that the legislative history is as "fraught with ambiguity" as the statutory text. App., *infra*, 27a.

The court of appeals rejected as "not credible" the Secretary's contention that he had not changed his interpretation of the statute. App., *infra*, 30a. The court concluded, however, that "the fact that the Secretary's interpretation may be different from that followed in the past is irrelevant so long as the current interpretation is reasonable and does not conflict with the unambiguously expressed intent of Congress." App., *infra*, 31a. Applying this rule, the court concluded that it was "bound by *Chevron*" to defer to the agency's new interpretation. App., *infra*, 32a.[6]

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the judicial deference due to an agency's interpretation of a statute under this Court's decision in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). The court of appeals' decision conflicts with decisions of other courts of appeals and this Court in two different respects. *First*, the court of appeals accorded *Chevron* deference to the Secretary's revised interpretation of the AMAA, even though the Secretary failed to explain — or even acknowledge — his departure from the agency's longstanding prior interpretation of that statute. The court of appeals' decision thus permits a federal agency to

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[6] The court of appeals also rejected additional arguments made by petitioners. App., *infra*, 32a-39a. In rejecting petitioners' argument that the location adjustments were not justified by an "economic service of benefit" to handlers, App., *infra*, 36a (quoting *Zuber* v. *Allen*, 396 U.S. at 183), the court held that "the Secretary's decision, while not necessarily conforming to the letter of this requirement, is sufficiently in compliance with its spirit not to require reversal." App., *infra*, 39a. The court stated that "the Secretary appears to have taken the position . . . that milk delivered to plants in the western and northern regions is now worth more than it was in 1977 because of increased consumption in those areas," and that this is sufficient to satisfy the requirement of an "economic service of benefit" to handlers. App., *infra*, 39a.

depart from its settled interpretation of statutory language without any explanation for doing so, so long as its new interpretation is one that otherwise qualifies for *Chevron* deference. *Second*, the court of appeals engaged in a superficial and perfunctory analysis of the statutory text, contrary to recent decisions of this Court that have determined congressional intent based on "reasonable inferences" from the language of the statute.

The underlying statutory issue in this case — whether the Secretary is required to base adjustments to minimum milk prices on consideration of the economic factors specified by Congress — is of considerable practical importance. Pursuant to the AMAA, the Secretary regulates the price of more than 100 billion pounds of raw milk each year, with an aggregate value of more than $13 billion.[7] The prices that handlers pay for milk, and the farm income that producers receive, are directly affected by price adjustments approved by the Secretary of Agriculture pursuant to § 608c(5). The court of appeals' decision leaves the Secretary with virtually unlimited discretion to set the prices that handlers actually pay for milk (and that producers actually receive) without regard to the economic factors specified by Congress in § 608c(18). The court of appeals' decision thus represents a major development in the federal government's regulation of milk prices, and a dramatic expansion of the Secretary's delegated authority under the AMAA.[8]

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[7] United States Department of Agriculture, Agricultural Marketing Service, Dairy Division, *Federal Milk Order Market Statistics, 1993 Annual Summary*, Tables 12, 17, 23 (AMS Stat. Bull. No. 886, Aug. 1994).

[8] The AMAA has been before this Court in prior cases. See, *e.g.*, *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984); *Zuber* v. *Allen*, 396 U.S. 168 (1969); *Lehigh Valley Coop. Farmers, Inc.* v. *United*

1. The court of appeals and the district court, as well as the agency's own ALJ, all concluded that "the Secretary's prior interpretations of §§ 608c(5) and 608c(18) explicitly recognized the fact that the Secretary's ability to promulgate location adjustments was restricted by § 608c(18)." App., *infra*, 28a. The court of appeals rejected, as "not credible," the Secretary's contention that he had not departed from his prior interpretation of the AMAA. App., *infra*, 30a. The court of appeals nevertheless held that the agency's unacknowledged and unexplained change of position was simply "irrelevant" for purposes of the *Chevron* analysis, because it concluded that the agency's "current interpretation is reasonable and does not conflict with the unambiguously expressed intent of Congress." App., *infra*, 31a.

a. The court of appeals' decision conflicts with decisions of other courts of appeals holding that an agency's revised interpretation of a statute that it administers is not entitled to *Chevron* deference unless the agency supplies a reasoned analysis for its decision to adopt a new interpretation. In *Mobil Oil Corp.* v. *EPA*, 871 F.2d 149 (D.C. Cir. 1989), the agency changed its interpretation of the term "facility" in a provision of the Resource Recovery and Conservation Act, 42 U.S.C. § 6924(h)(4). The court of appeals deferred to the agency's new interpretation, but only because the agency had "acknowledged that change" and "cogently explained the reasons for it." *Id.* at 154. The court explained that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Id.* at 152 n.5

States, 370 U.S. 76 (1962); *Brannan* v. *Stark*, 342 U.S. 451 (1952); *Stark* v. *Wickard*, 321 U.S. 288 (1944); *United States* v. *Rock Royal Coop, Inc.*, 307 U.S. 533 (1939). The Court's decisions repeatedly have stressed the narrowness of the Secretary's authority under the AMAA. See *infra* note 14.

(quoting *Greater Boston Television* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). Other courts of appeals have reached the same conclusion. See, *e.g.*, *Sacred Heart Medical Center* v. *Sullivan*, 958 F.2d 537, 544 (3d Cir. 1992) ("agency must offer a 'reasoned justification' for the change in its interpretation of a statute"); *Mazza* v. *Secretary of Dep't of Health & Human Services*, 903 F.2d 953, 959 (3d Cir. 1990) (reversing denial of Social Security benefits because, *inter alia*, agency "has not offered a reasoned justification" for changing its interpretation); *Flagstaff Medical Ctr., Inc.* v. *Sullivan*, 962 F.2d 879, 886 (9th Cir. 1992) ("changes in agency interpretation must be supported by a 'reasoned analysis' over and above that required for an interpretation in the first instance"); *Seldovia Native Ass'n Inc.*, v. *Lujan*, 904 F.2d 1335, 1346 (9th Cir. 1990) (agency's revised interpretation not entitled to deference unless "'the agency acknowledges and explains the departure form its prior views'") (citation omitted); *Exxon Corp.* v. *Lujan*, 970 F.2d 757, 762 n.4 (10th Cir. 1992) (when an agency changes its interpretation of a statute, it "'is obligated to supply a reasoned analysis for the change'") (citation omitted). See also 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 122 (3d ed. 1994) (agency must explain the reasons for changing the meaning it attaches to ambiguous statutory language).[9]

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[9] In *De Osorio* v. *INS*, 10 F.3d 1034 (4th Cir. 1993), the court stated that, "[b]ecause we find the Board's interpretation reasonable and consistent with congressional intent, any inconsistency between this decision and previous Board decisions is immaterial." *Id.* at 1042. Although the court did not state that the agency was required to provide a reasoned analysis of its change in position, it noted that the agency's prior position did not actually conflict with the agency's current interpretation of the statute. *Id.*

The court of appeals' decision is also in tension with this Court's decision in *Rust* v. *Sullivan*, 500 U.S. 173 (1991). In *Rust*, the Court deferred to the agency's revised interpretation of Section 1008 of the Public Health Service Act, 42 U.S.C. § 300a-6. Although the Court in *Rust* did not expressly consider whether the "reasoned analysis" requirement applies when an agency claims *Chevron* deference for a revised interpretation of a statute, the Court pointedly noted that "the Secretary amply justified his change of interpretation with a 'reasoned analysis.'" *Id.* at 187 (quoting *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).[10]

b. The decisions requiring an agency to provide a "reasoned analysis" of a change from one statutory interpretation to another as a prerequisite for *Chevron* deference are correct. The "reasoned analysis" requirement applies when the agency exercises its discretion to make a change that affects policy. See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42 (agency must explain departure from prior course that presumably reflected agency view that it would best "carry out the policies committed to it by Congress"); *Greater Boston Television*, 444 F.2d at 852 (requirement applies when agency's "policies are in flux"). The requirement plainly should be held to apply in the *Chevron* setting, because the basis for according *Chevron* deference to

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[10] The court of appeals' sweeping conclusion that an agency's change of position is simply "irrelevant" for *Chevron* purposes so long as its new interpretation is reasonable also conflicts with numerous decisions of this Court which recognize that "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993). See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

the agency is the recognition that the choice among reasonable statutory interpretations is "often more a question of policy than of law." *Pauly* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991). See *Chevron*, 467 U.S. at 865 (agency, unlike a court, may draw on "views of wise policy to inform its judgments"). See also *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 923 (D.C. Cir. 1991) ("resolution of an ambiguity in a statute, if it has consequences, inevitably requires the agency to consider competing policy objectives; it is the reconciliation of such conflicts that is entitled to judicial deference under *Chevron*").

According deference to the unexplained changes in statutory interpretation creates a grave risk of deferring when there is no valid reason for doing so. When an agency acts without acknowledging that its conduct is based on a new interpretation of a statute, it is entirely possible that the agency decision maker in whom discretion is vested has not made a considered decision to interpret the statute in a new way. Such unacknowledged changes may represent no more than *ad hoc* (and often *post hoc*) rationalizations by the agency. In such cases, there has been no considered exercise of an agency's congressionally-delegated discretion, and thus no *policy* choice to which courts should defer under *Chevron*.[11]

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[11] When an agency has acted in a way that is difficult to reconcile with its prior actions, the agency's lawyers may advance a new statutory interpretation in an effort to justify the agency's action. But "[s]tatements of agency lawyers in briefs and oral arguments are particularly unreliable evidence for an agency's policy, given the powerful incentive for lawyers to take any position that is likely to further their clients' interests in a case and the uneven level of supervision of the work product of agency lawyers." 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 120 (3d ed. 1994). These concerns are particularly applicable to this case. The agency's revised interpretation was announced

c. In this case, the Secretary failed even to acknowledge his departure from the agency's established interpretation of the AMAA, let alone to offer any reasoned explanation for the change. Indeed, when petitioners pointed out that the Secretary had departed from his longstanding interpretation of the AMAA, the Secretary denied having done so. Consequently, the Secretary cannot possibly have satisfied the "reasoned analysis" requirement of *Mobil Oil* and similar cases. There is no evidence whatever that the agency's new interpretation of the AMAA reflects a considered exercise of congressionally-delegated discretion. The court of appeals nevertheless accorded full *Chevron* deference to the new interpretation, dismissing the agency's unacknowledged and unexplained departure from its longstanding prior interpretation as "irrelevant." App., *infra*, 31a. Further review is warranted because this case would have been decided differently by the courts of appeals for the D.C., Third, Ninth, and Tenth Circuits.[12]

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more than 50 years after Congress enacted § 608c(18), and the ambiguity supporting the revision was first discovered by the agency in the course of litigation.

[12] Although not presented as a separate question for review by this Court, petitioners note that the court of appeals' effort to construct an "economic service" justification for the price increases (see *supra* note 6) violates the cardinal rule that an administrative order can be sustained only on "the grounds upon which the agency acted." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). The Secretary plainly did not conclude that increased consumption of milk in certain areas was sufficient to satisfy the "economic service" requirement. Indeed, the court of appeals' exclusive reliance on a demand-side factor actually *conflicts* with the Secretary's approach to such issues, which requires a balancing of supply and demand factors. See 59 Fed. Reg. 42,422 (1994); 59 Fed. Reg. 61,070, 61,091-97 (1994). Because the court of appeals' "demand-side only" approach to "economic service" is contrary to § 608c(18), it is unnecessary to decide whether it is additionally flawed for failure to comport with *Chenery* or *Zuber* v. *Allen*.

2. a. In concluding that Congress did not resolve the underlying question in this case, the court of appeals engaged in a perfunctory and superficial analysis of the statutory text. In so doing, the court of appeals departed from recent decisions of this Court, which hold that if "the text *and reasonable inferences from it* give a clear answer against the Government," that "'is the end of the matter.'" *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994) (quoting *Good Samaritan*, 113 S. Ct. at 2157)) (emphasis added).

The Court's unanimous decision in *Brown* drew several inferences from the text of a veterans' statute, 38 U.S.C. § 1151, to conclude that disabled veterans are not required to show that their disability resulted from negligent treatment by the government or an accident during treatment in order to receive certain benefits. Although the Court agreed with the government's contention that the statutory term "injury" can "carry a fault connotation," 115 S. Ct. at 555, it did not immediately conclude that the statute was ambiguous. Instead, the Court drew inferences based on the "presumption that a given term is used to mean the same thing throughout a statute," as well as the maxim *noscitur a sociis* ("a word is known by the company it keeps"), and concluded that "injury" cannot reasonably be interpreted to imply fault in the context of 38 U.S.C. § 1151. *Id.* (quotation omitted). The Court also rejected the government's alternative argument on the basis of the maxim that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

inclusion or exclusion." *Id.* at 556 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).[13]

In this case, the district court drew inferences from the statutory text to conclude that Congress has given "a clear answer against the Government." *Brown*, 115 S. Ct. at 556. As in *Brown*, the district court conceded that "[a]t first blush, it might seem that the phrase 'minimum price' as used in section 608c(18) is ambiguous." App., *infra*, 53a. But the court proceeded to "examin[e] the phrase in the context of the rest of the statute" and "apply[] traditional canons of statutory construction." *Id.* Based on this more searching analysis, the district court concluded that "the term is not ambiguous and that [petitioners'] definition should prevail." *Id.*. The district court relied on the canon of statutory construction that "[a] statute should be viewed as a whole." *Id.* (citing 2A *Sutherland on Statutory Construction* § 46.05). The district court looked to the language of §§ 608c(5)(A) and 608c(5)(B)(ii)(c) to conclude that "the term 'minimum price' encompasses both the original uniform price and the adjusted price." App., *infra*, 54a & n.7. The district court also relied on the language of § 602, a "very general provision" that "refers to the entire pricing scheme set up under the statute." App., *infra*, 55a. The district court then applied the maxim that a court should be guided by "the purpose of the statutory scheme" in interpreting statutory language. App., *infra*, 57a. The court concluded that the purpose of the Act is to "guide the Secretary in setting prices in order to avoid disorderly

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[13] *Brown* v. *Gardner*, decided six weeks after the court of appeals' decision in this case, is one of several recent decisions of this Court that have concluded, based on rigorous analysis of the statutory text and inferences drawn from it, that Congress has spoken to the particular question at issue. See, *e.g.*, *MCI Telecommunications Corp.* v. *AT&T*, 114 S. Ct. 2223 (1994); *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588 (1994).

market conditions," and that it would be "illogical for Congress to carefully articulate all factors the Secretary must take into account when fixing class prices yet allow location adjustments, which ultimately affect the actual cost of milk, to be adjusted without any guidance whatsoever." *Id.* at 57a-58a.

The court of appeals, unlike the district court, made no attempt to draw reasonable inferences from the statutory text, and did not even state whether it was prepared to do so. The court of appeals' textual analysis amounted to little more than a conclusory statement that "we cannot find the plain language of the statute to be unambiguous." App., *infra*, 23a. The court of appeals did not even discuss some of the inferences drawn by the district court, such as its inference based on § 602.[14] The court of appeals thus deferred to the Secretary's interpretation based on little more than its conclusion that, "at first blush," the phrase "minimum prices"

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[14] The court of appeals also failed to consider whether it was reasonable to infer that the terms "prices" and "farm income" in § 608c(18) refer to the prices actually paid for milk and the farm income actually received by farmers. Moreover, the court of appeals largely ignored the well-known history of the AMAA. The AMAA replaced the Agricultural Adjustment Act ("AAA"), 48 Stat. 31, which delegated to the Secretary of Agriculture broad authority to issue licenses to handle agricultural commodities and to eliminate unfair practices or charges. The constitutionality of the AAA was called into question by the Court's decision in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), which "disapproved a similarly broad delegation of power under the National Industrial Recovery Act." *Zuber* v. *Allen*, 396 U.S. at 175. "With [*Schechter*] specifically in mind, Congress set forth with deliberate particularity and completeness the terms which the Secretary might include in marketing orders." *Brannan* v. *Stark*, 342 U.S. 451, 465 n.16 (1952). Congress's intent was "to confine the boundaries of the Secretary's delegated authority." *Zuber*, 396 U.S. at 183. See also *Lehigh Valley*, 370 U.S. at 91-92. The practical effect of the court of appeals' decision is to give the Secretary largely unguided discretion to set milk prices.

is ambiguous. In so doing, the court of appeals departed from this Court's practice in recent cases of drawing all reasonable inferences from the statutory text to discern the intent of Congress. Accordingly, it would be appropriate for the Court to grant the petition, vacate the decision of the court of appeals, and remand for further consideration in the light of *Brown* v. *Gardner*.[15]

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[15] The Court may also wish to consider holding the petition in this case pending its decision in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, No. 94-859 (argued April 17, 1995). The question presented in *Sweet Home Chapter* is whether *Chevron* deference is owed to the agency's definition of the term "harm" in the Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1). See Pet. in No. 94-859 at i. Because the court of appeals applied the maxim *noscitur a sociis* to conclude that the Secretary's construction of the statute was contrary to Congress's intent, see *Sweet Home Chapter* v. *Babbitt*, 17 F.3d 1463, 1465 (D.C. Cir. 1994), it is possible that the Court's decision in *Sweet Home Chapter* will shed additional light on the role of inferences from the statutory text at one or both stages of the *Chevron* analysis.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be granted, the decision of the court of appeals vacated, and the case remanded for further consideration in the light of *Brown* v. *Gardner*, 115 S. Ct. 553, 556 (1994).

Respectfully submitted,

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